West Michigan Plumbing and Heating, Inc. *and* Local Union No. 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, CLC. Case 7–CA–42086

February 28, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On May 11, 2000, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, West Michigan Plumbing and Heating, Inc., Richland, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

"(b) Reassigning or discharging employees because they engage in union activities on behalf of Local Union 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, or any other labor organization."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate, implement, and maintain a rule which encourages employees, who believe that they are being coerced or pressured to join a union or sign an authorization card, to report the matter to management.

WE WILL NOT reassign, isolate, or discharge employees because they engage in union activities on behalf of Local Union 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of

[1] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's dismissal of the 8(a)(1) interrogation of employee Mikkel Wagner and the judge's finding that Foreman Greg Goole was not a supervisor within the meaning of Sec. 2(11) of the Act.

The judge found that the Respondent unlawfully reassigned, isolated and discharged employee Wagner for his protected union activities. In doing so, the judge relied on, inter alia, two parts of provision A-1 of the Respondent's employee handbook as evidence of antiunion animus on the part of the Respondent. One part of provision A-1 contains an unlawful reporting requirement that the judge found, and we agree, independently violates Sec. 8(a)(1) of the Act. The other part of provision A-1 cited by the judge includes union opposition statements, which are set forth in sec. II,B,3,b,(2) of the judge's decision. In adopting the judge's decision, we find that there is sufficient evidence, including the independent 8(a)(1) violation based on the first part of provision A-1 described above, that the Respondent acted out of antiunion animus towards Wagner. Therefore, we find it unnecessary to pass on whether the other part of provision A-1—the union opposition statements—also constitutes evidence of the Respondent's antiunion animus.

The judge also found in sec. II,B,3,c, par. 5 of his decision that the Respondent's investigation preceding Wagner's discharge was "tailored" to gather evidence of alleged unprotected activity on the part of Wagner. We find it unnecessary to decide whether this investigation constituted additional evidence of the Respondent's unlawful motive. We, however, agree with the rest of the judge's analysis. The evidence shows that Mark Dobbins, the Respondent's owner and president, was aware that Wagner spoke to coworkers about the benefits of joining the Union in the context of the Union's ongoing organizing campaign involving the Respondent's operations and with the aim of having the Respondent become a union contractor.

[3] In his recommended Order, the judge inadvertently failed to include a cease-and-desist provision for the adverse action taken against union supporter Mikkel Wagner. We have modified the Order to correct this inadvertent omission. We also have modified the judge's recommended notice in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

the United States and Canada, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind our rule which encourages employees, who believe that they are being coerced or pressured to join a union or sign an authorization card, to report the matter to management.

WE WILL, within 14 days from the date of the Board's Order, offer Mikkel Wagner full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Mikkel Wagner whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful reassignment and discharge of Mikkel Wagner, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that neither the reassignment nor the discharge will be used against him in any way.

WEST MICHIGAN PLUMBING AND HEATING, INC.

Thomas Doerr and *Steven E. Carlson, Esqs*., for the General Counsel.

Timothy J. Ryan and *Elizabeth W. Lykins, Esqs*., of Grand Rapids, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on October 27, 1999. The charge was filed on June 1, 1999,[1] by Local Union No. 357, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, CLC (the Union), and was amended on July 26, 1999. The complaint, issued on July 27, 1999, alleges that West Michigan Plumbing and Heating, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the Act by maintaining a rule in its handbook encouraging employees to report to Respondent employees who solicit other employees to join the union; coercively interrogating employees about their union activity; and reassigning, isolating, and ultimately discharging its employee, Mikkel Wagner, because of his union activities. The complaint was amended on August 11, 1999, to allege that the Respondent's foreman, Gregory Goole, is a supervisor within the meaning of Section 2(11) of the Act, as well as the Respondent's agent within the meaning of Section 2(13) of the Act. The Respondent's timely answer denied the material allegations of the amended complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the installation of plumbing, hot water and steam heat systems, process piping, sheet metal, pipe insulation, and temperature control works at its facility in Richland, Michigan, and at various construction sites located within the State of Michigan. In the calendar year ending December 31,1998, it purchased and received at this facility and at these locations, supplies and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan.

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further finds and I admit that that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

In September 1998, Mikkel Wagner applied for a job as an apprentice plumber with the Respondent. A month later, the Union solicited applications in the local newspaper for its apprenticeship program. Wagner responded to the advertisement, took a mechanical aptitude test, and attended a panel interview before the Union's joint apprenticeship raining committee.

In early December 1998, Wagner was interviewed by the Respondent's vice president, Jerry Schauer, and hired as an apprentice plumber. Over the next several months, he worked throughout southern Michigan on various work crews.

In mid-April 1999, the Union notified Wagner that he had been accepted into its apprenticeship program. He was advised that his name would be added to a list of apprentices, but that it could be awhile before he was called to work. Eventually Wagner phoned the Union's business manager, Bob Williams, who told him that it could be anywhere from a couple of days to a week before he was contacted for work.

Shortly thereafter, Wagner received a phone call from union organizer, David Knapp, who asked to meet with him at the union hall. Williams had told Knapp that Wagner was working for an unorganized contractor. Knapp asked Wagner if he would try organizing the Respondent's work force for the Union. Knapp explained that the goal was to persuade his coworkers to consider the Union as their representative with the Respondent. Wagner was reluctant to make a commitment because he enjoyed working for the Respondent and assumed that if he got involved in organizing the Respondent's employees, he would have to leave the Respondent's employment. Knapp explained to Wagner that he would continue working for the Respondent while he organized the employees. After talking to

[1] All dates are in 1999, unless otherwise indicated.

a few coworkers who were familiar with the Union and its apprenticeship program, Wagner accepted the task.

In early May, Wagner began telling his coworkers about the Union and passing out union literature. He also talked with Greg Goole, a foreman, about the Union. Goole testified that eventually he told Wagner that he "didn't want to hear about it any more." (Tr. 164.) According to Goole, some of the employees were also getting tired of hearing Wagner talk about the Union and urged Goole to fire him. One employee in particular, named Jon Boven or (Jonny B), berated Wagner for trying to start a union and referred to him as "union boy." Boven continuously complained to Goole about being hassled by Wagner to support the Union. Goole testified that Boven kept coming to him saying, "[Y]ou know, get rid of this dude, I mean, we are tired of hearing all the—all the, you know, all the stuff about the Union." (Tr. 165.)

On May 20, Wagner reported for work at a jobsite in Battle Creek, Michigan, and was promptly told to report to the shop, where the Respondent's vice president, Jerry Schauer, was waiting to talk to him.[2] When Wagner arrived at the shop, Schauer told Wagner that he needed him to fill-in for the regular shop worker, who sustained a work-related injury the day before. Schauer explained that Wagner had been chosen to fill the job in order to broaden his experience and improve his welding skills.

Later that afternoon, Schauer and Mark Dobbins, the Respondent's owner and president, met with Foreman Goole ostensibly to review his employee performance. In the course of their discussion, Goole complained that Wagner was always talking about the Union on the job. He also said that Wagner had tried to coerce and harass him and other employees to leave the Company to work for a union contractor. (Tr. 101.) Goole identified the other employees as Rob Sisco and Jon Boven.

The very next day, Schauer moved Wagner's workbench from the back of the shop building to the front of the building. Schauer testified that when he spoke to Wagner that morning, Wagner mentioned that the lighting in the shop was poor. Schauer also stated that it was spring and it was getting stuffy and humid in the back of the building, so he decided to move the worktable to the front of the building. The implication therefore is that the table was moved to accommodate Wagner.[3] But Wagner credibly denied that he told Schauer that it was hot working in the back and without hesitation he pointed out that "it was May," when the table was moved, which makes Schauer's explanation even more dubious. (Tr. 93.) In addition, the evidence shows that whenever there was one person assigned to the shop, that person primarily worked in the back. (Tr. 152.) The only time anyone worked in the front of the building was when two or more employees were working on a project. Wheeler had worked 5–6 months in the back before pulling a muscle in his forearm (Tr. 153.) There is no evidence it was expected that he would be absent from work for more than a week or so. Thus, there was little incentive for Schauer to deviate from the norm to "accommodate" Wagner on a very short-term basis. On the other hand, the uncontradicted evidence shows that from his second floor office window Schauer had a much better view of Wagner working in the front than in the back, which on its face, was a significant incentive to move the table. Thus, I find that Schauer's testimony about why he moved Wagner's workbench to the front of the shop building is unconvincing.

In the meantime, Dobbins decided to question Sisco and Boven about their encounters with Wagner. He prepared a prototype statement for them to sign, which stated that Wagner had talked to them about leaving the Respondent. Dobbins visited the two employees on the jobsite and asked them if Wagner had encouraged them to leave their jobs. At Dobbins' request, Sisco provided two handwritten statements: one stating that Wagner had talked to him about leaving the employment of the Company (R. Exh. 11); and another stating that he observed Wagner talking to Greg Goole about leaving the Company. (R. Exh. 12.) Boven gave Dobbins a handwritten statement saying that he had observed Wagner trying to persuade Goole to resign from the Company. (R. Exh. 13.)

On May 25, the Union faxed Dobbins a letter advising him that Wagner was a volunteer organizer for the Union. The next day, Dobbins decided to confront Wagner and fire him. He advised Shauer of his decision and told him to bring Wagner to the office.

Dobbins told Wagner that he was being fired for attempting to convince and coerce employees to leave the Company. Wagner asked him if his discharge had anything to do with the Union to which Dobbins responded, "No." (Tr. 77.) He also stated that he did not want to even talk about the Union. However, Wagner testified that when he tried to explain to Dobbins that he was simply responding to questions about the Union from the employees, Dobbins asked which employees were asking about the Union. Wagner told him Greg Goole, Chris Rogers, and Chris Williams.

In contrast, both Dobbins and Schauer denied that Dobbins ever asked Wagner to identify the employees who were asking questions about the Union. (Tr. 108.) For demeanor reasons, I am unconvinced by their testimonies. Not only was Wagner's testimony more credible and convincing, it is also corroborated by a prior consistent statement (his Board affidavit), which ironically was placed in evidence by the Respondent. (R. Exh. 15, par. 11.) Specifically, the prior statement reflects that Wagner told Dobbins that he had been answering other employees' questions about union benefits and that Dobbins asked him to identify the employees who had asked the questions. Thus, I credit Wagner's testimony that Dobbins asked him to identify who was asking about the Union.

On May 26, 1999, the Respondent discharged Wagner purportedly for encouraging Goole and other employees to leave the Respondent to work for a competitor.

[2] The shop was located in the rear of a pole building, across from the Respondent's office. Parts were prefabricated in the shop for use on the jobsites. Equipment and supplies were kept in the same building.

[3] The evidence shows that the equipment used for bending pipe remained in the back of the building, which meant that Wagner had to walk between the two shops to perform his job. Thus, contrary to the impression that Schauer sought to foster, the evidence supports a reasonable inference that moving the table was little, if any, accommodation to Wagner.

B. Analysis and Findings

1. Supervisory status of Greg Goole

The amended complaint alleges that Foreman Greg Goole was a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

Section 2(11) of the Act defines a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgement.

The statutory language is disjunctive and the exercise of any one of the listed indicium is sufficient to find that an individual is a supervisor. *Entergy Systems & Services,* 328 NLRB 902 (1999). The duties must be exercised with independent judgment on behalf of management and not in a routine manner. *Masterform Tool Co.,* 327 NLRB 1071 (1999)*, Amperage Electric,* 301 NLRB 5, 13 (1991). The burden of proving supervisory status is on the party asserting that supervisory status exists. *Chevron U.S.A.*, 309 NLRB 59, 62 (1992).

The evidence shows that Goole is a licensed master plumber with the skill and experience to provide direction and guidance to the employees. Wagner testified that the foreman or senior person on the jobsite tells the employees where to report for work on a particular day or asks them to work overtime or gives them permission to leave work early (Tr. 51–53). There is no evidence, however, that these decisions involve independent judgment or that they are anything more than routine in nature. Rather, Schauer's uncontradicted testimony shows that he, along with Dobbins, determines who will work on a particular job and he determines whether an employee will work overtime. Schauer's uncontradicted testimony also shows that he gives directions to the foremen by pager or by actually visiting the jobsite. Thus, the evidence supports a reasonable inference that Goole acts as a conduit of orders from Schauer, relaying information rather than exercising independent judgment. *George C. Foss Co.,* 270 NLRB 232 (1984).

In addition, there is no evidence that Goole or any other foreman has the authority to hire, fire, or discipline employees. Nor is there any evidence that he ever effectively recommended the same. Schauer's uncontradicted testimony is that he does not rely heavily on input from foremen in determining whether an employee should receive a wage increase. Although employees complained to Goole about Wagner soliciting support for the Union and asked him to remove Wagner from the jobsite, there is no evidence that Goole had the authority to transfer employees or that he took any action on his own to reassign Wagner. Moreover, even if the employees perceived Goole to have the authority to transfer Wagner from one job to another, the Board has held that the perception of employees does not, without more, confer supervisory status. *Masterform Tool Co.,* supra.

For all of these reasons, I therefore find that Foreman Greg Goole was not a supervisor within the meaning of Section 2(11) of the Act.[4]

2. The 8(a)(1) violations

a. The unlawful employee handbook provision

It is settled Board law that:

> employers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees bothering, pressuring, abusing, or harassing them with union solicitations and imply that such conduct will be punished. (citations omitted.) [The Board] has reasoned that such announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels "bothered" or "harassed" or "abused" when fellow workers seek to persuade him or her about the benefits of unionization."

Greenfield Die & Mfg. Corp., 327 NLRB 257 (1998). However, the Board has also held that requests to employees to report only threats made by union organizers or other employees may not constitute a violation of the Act. *CMI-Dearborn, Inc.,* 327 NLRB 771 (1999).

The undisputed evidence shows that the Respondent has an employee handbook that was in effect at the time of Wagner's employment. All employees receive a copy of the handbook at the time of hire and are asked to acknowledge receipt in writing. (Tr. 125.) According to Wagner's uncontradicted testimony, Schauer gave him a copy of the employee handbook when he began working for the Respondent and had him sign "a sheet stating that I accepted those." (Tr. 48.)

A section of the employee handbook, entitled, "*A-1 A Word About Unions*," reflects the Respondent's opposition to unions. (G.C. Exh. 3.) It states, in pertinent part, the following:

> Also, if anybody should at any time cause any of our employees any trouble at their work or put them under any sort of coercive or undue harassment to join a union or sign a card, our employees should let their supervisor know about it, and we will see that it is stopped.

The General Counsel argues that the rule violates Section 8(a)(1) of the Act because it encourages employees to report all union activity, regardless of whether it is protected or not, and discourages employees from engaging in protected union activity by threatening to discipline them. The Respondent argues that the disputed language does not have a "potential dual purpose effect" of encouraging employees to report protected union activity and discouraging employees from engaging in such activity.

The disputed language is not limited to threats only. Indeed, the rule does not even mention threats. Rather, it is broadly written to include every contact that the employees might subjectively regard as "coercive" or "harassing." Thus, I find that

[4] The General Counsel does not argue, nor does the evidence show, that Goole was an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

the rule may reasonably be construed as interfering with, restraining, and coercing employees in violation of Section 8(a)(1) of the Act.

b. The unlawful interrogation

The amended complaint at paragraph 8 alleges that Dobbins coercively interrogated Wagner during the discharge meeting on May 26, 1999, by asking him to identify the employees who asked questions about the Union. In determining whether an interrogation into protected conduct is coercive, the Board applies a "totality of circumstances test." *Rossmore House,* 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Specifically, the Board considers whether the interrogated employee is an open or active supporter of the union, the background surrounding the interrogation, the nature and purpose of the information sought, the identity of the questioner, and the place and/or method of the interrogation. *Bourne Co. v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964). These factors are not mechanically applied. Rather, they are a useful indicia that serve as a starting point for assessing the "totality of circumstances." *Medcare Associates, Inc.,* 330 NLRB 935, 939 (2000).

The evidence shows that Wagner, a known union advocate, was called to a meeting with Dobbins and Schauer, the two highest managers in the Company, to be discharged purportedly for encouraging employees to work for another employer. The purpose of the meeting, therefore, was not to question him about his union involvement or the union involvement of any other employees. Notably, the undisputed evidence shows that in the course of the meeting, Wagner, himself, raised the issue of his union activity by asking Dobbins whether he was discharging him for supporting the Union. The undisputed evidence also shows that Dobbins sought to avoid discussing the Union by telling Wagner "that this had nothing to do with the union and that he didn't even want to discuss the union." (R. Exh. 15, p. 4, par. 11.)

However, Wagner persisted and pursued the issue by telling Dobbins that he had not solicited employees to leave their jobs with the Respondent, but instead had only responded to employee questions about the Union. Reacting to Wagner's statement, Dobbins precipitously asked who were the employees asking questions about the Union? Before he could say another word, Wagner replied by giving him a few names. Viewed in context, the evidence supports a reasonable inference that Dobbins' comment was a reaction to what he perceived as an incredulous explanation by Wagner of what he told the employees. The inference is further supported by the fact that there is no evidence that Dobbins pursued the questioning about the Union after Wagner blurted out the names of three employees. Thus, the evidence shows that Wagner was not called to the office to be questioned about the Union and that the discussion about union activity was not initiated or pursued by Dobbins. Under the totality of circumstances, I find that the inquiry was not coercive.

Accordingly, I shall recommend that paragraph 8 of the amended complaint be dismissed.

3. The 8(a)(3) violations

a. The Wright Line standard

In a typical 8(a)(3) discrimination case, the General Counsel's evidence must support a reasonable inference that protected concerted activity was a motivating factor in the employer's decision.[5] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Since employer motivation is a factual question, which rarely will be proved by direct evidence, unlawful motivation may be inferred from the total circumstances proved. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once the General Counsel has satisfied this evidentiary burden, the employer must persuasively establish by a preponderance of the evidence that it would have made the same decision, even in the absence of union activity. *T&J Trucking Co.,* 316 NLRB 771 (1995).

b. The unlawful reassignment of Wagner

(1) Union activity and knowledge

Ample evidence exists that Wagner was an open and active union advocate. Even before he actually began organizing the Respondent's employees, Wagner told his foreman, Greg Goole, that he was waiting for a phone call from the Union. (Tr. 159.) After Wagner was accepted into the Union's apprenticeship program, he tried to persuade Goole and other employees to support the Union. He passed out literature about union benefits and encouraged employees to visit the union hall. Some employees complained to Goole that they were tired of hearing Wagner talk about the Union. (Tr. 165–166.) One employee, Jon Boven, derisively began calling Wagner "union boy." (Tr. 168.) Goole himself told Wagner that he "didn't want to hear about [the Union] any more." (Tr. 164, 166.) Some of the employees also asked Goole to have Wagner fired or transferred to another job. Thus, the evidence supports a reasonable inference that Wagner's' union activity was widely known to the members of his work crew.

The Respondent argues, however, that Schauer and Dobbins had no knowledge of Wagner's union activities prior to the date that he was reassigned to work in the shop. Goole testified that he did not tell Schauer or Dobbins that Wagner was trying to organize the employees prior to his performance review on May 20 (the day after Wagner was reassigned). (Tr. 167.) Schauer and Dobbins denied that they knew anything about Wagner's union activity prior to the Goole's review. (Tr. 145, 109.) Although there is no direct evidence to the contrary, I find that their testimonies, individually and collectively, are incredulous.

The evidence shows that Goole had good reason and sufficient opportunity to inform Schauer that Wagner was trying to organize the employees. Goole is a 10-year employee of the Respondent. He began as an apprentice in the field, attended a community college apprenticeship program sponsored by the Respondent, rose to journeyman and on to master plumber. He

[5] *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

never worked for any other plumbing contractor. He was paid a high hourly rate and he was the Respondent's point person or conduit of information on the jobsite. The evidence therefore supports a reasonable inference that Goole had a strong reason (loyalty) to advise Schauer that a new apprentice was attempting to unionize the workforce. In contrast, there was no reason for Goole not to report Wagner's union activity. Goole testified that he did not agree with what Wagner had to say about the Union and that in the final analysis he considered Wagner to be a "nobody." (Tr. 164.) Thus, the evidence reflects that there was every reason for Goole to advise Schauer of Wagner's union activity and no reason for him not to do so.

The evidence further discloses that Goole did not like Wagner talking to the crew about the Union. He testified that Wagner "would go bother my crew and get them all riled up" (Tr. 163) to the point "where he just was talking Union to everyone on the crew and they would come up to me and say they were sick and tired of it, get rid of him." (Tr. 164.) Goole himself grew tired of listening to Wagner "preach" about the Union. The evidence therefore shows that Goole had another compelling reason for reporting Wagner's union activity to Schauer.

Finally, the evidence shows that Goole had numerous opportunities to advise Schauer about Wagner's union activities. Goole testified that "at least once a day [he communicated] with him [Schauer], let him know how the job is going, what is going on." (Tr. 167.) It is implausible that that with so many opportunities to apprise Schauer of the situation, and with the increasing employee discontent with Wagner's union activities, that Goole, a long-time employee, did not inform Schauer that a new apprentice was trying to start a union.

Goole unpersuasively attempted to explain why he did not mention anything to Schauer before his May 20 employee review. He explained "I don't let that stuff bother me. I let it go in one ear and out the other. I really don't care what he [Wagner] has to say . . . ." (Tr. 167.) He also unconvincingly testified that even though his crew was "riled up" and wanted him to get rid of Wagner, he debated whether he should say anything about Wagner's union activity during his employee performance review. Goole's testimony in this respect was unconvincing.

Further, the evidence shows that independent of his daily communications with Goole, Schauer had ample opportunity to learn first hand of Wagner's union activities by visiting the jobsite and speaking with the employees. Schauer unequivocally testified that he was Wagner's "immediate supervisor." (Tr. 150.) He stated that he periodically visited the jobsites and that he communicated directly with the employees. (Tr. 139, 118.) It is implausible that the employees, who complained to Goole, did not complain to Schauer about Wagner's union activities, particularly since Goole took no immediate action when they complained to him.

Based on all of the evidence viewed as a whole, I find that Schauer had knowledge of Wagner's open and active union activity prior to May 19, 1999.[6]

(2) Union animus and adverse action

The provision of the Respondent's employee handbook entitled "A Word About Unions" (GC Exh. 3) demonstrates that the Respondent was opposed to unions. In addition to advising its employees to report anyone who pressured them to join a union or sign an authorization card, the handbook provision states, among other things, that:

> Experience shows that where there are unions, there is often trouble, strife, and discord—strikes—lost work—lost wages violence. It is our belief that a union would not work out to our employees' benefit. It is, therefore, our desire that by fair and square treatment of our employees everywhere, they will never feel that they need union representation. (GC Exh. 3.)

Animus also can be inferred from Schauer's conduct in moving Wagner's workbench from the back of the shop building to the front of the building, where there was a much better view of Wagner working from Schauer's office. (Tr. 146, 154.) Schauer conceded that one of the reasons that he moved the workbench from the back to the front of the building was because it provided him a better view from his second floor office window of Wagner working.[7] (Tr. 154.) I therefore find that evidence of union animus exists.

Finally, the evidence shows that on the morning of May 20, 1999, Wagner was reassigned from the working on a jobsite with a crew to working alone in the shop, which was located across from the Respondent's office. The very next day, Schauer moved Wagner's workbench from the back to the front of the building, where he had a better view of Wagner working. The evidence supports a reasonable inference that Schauer reassigned and isolated Wagner after learning of his union activities.

Accordingly, I find that the General Counsel has sustained his initial evidentiary burden and that the Respondent must demonstrate that it would have reassigned Wagner even in the absence of his union activities.

(3) The countervailing evidence

The countervailing evidence shows that around noon on May 19, 1999, Apprentice Richard Wheeler, who normally works in the shop, injured a tendon or ligament in his right forearm and subsequently missed several days of work. (R. Exhs. 5, 6.) Wagner, himself, was sick on May 19, having acquired food poisoning at a local fast food restaurant. The next day, May 20, Schauer reassigned Wagner to work in the shop. The Respondent asserts that over the years many employees have been assigned to work in the shop. Schauer testified that he selected Wagner to cover for Wheeler to give him a chance to learn and have some of his skills refined on the soldering aspect of the trade. (Tr. 140–141.) There is no evidence that Wagner's soldering skills were deficient. There is no evidence that a journeyman or master plumber or anyone else was assigned to work with Wagner in the shop to help him improve his skills. Rather,

[6] The evidence shows that Schauer and Dobbins were long time business associates who consulted each of other on work-related decisions. Thus, the evidence supports a reasonable inference that Schauer advised Dobbins of Wagner's union activity prior to May 19.

[7] The amended complaint does not allege, and the General Counsel does not argue, that relocating Wagner's worktable from the back to the front of the shop building violates the Act.

the evidence shows that Wagner was assigned to work alone in the shop. Although the evidence shows that the Respondent needed someone to fill in for Wheeler, there is no evidence showing why Wagner was selected out of approximately 40 plumbers for the isolated duty. I therefore find that the Respondent's reason for assigning Wagner to work in the shop is pretextual.

Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of Act as alleged in paragraph 9 of the amended complaint.

c. The unlawful discharge

It is undisputed that by May 26, Dobbins and Schauer had knowledge of Wagner's union activities. Goole had discussed Wagner's union activity with them on May 20. Dobbins had interviewed Sisco and Boven on May 21. The Union sent Dobbins a letter on May 25 identifying Wagner as a union organizer. There is also evidence of animus as discussed above. I therefore find that the General Counsel has sustained his initial evidentiary burden.

The Respondent argues on brief at page 13, however, that Wagner was lawfully discharged on May 26 for soliciting its employees to go work for a competitor. The position is not supported by the evidence viewed as a whole. Dobbins testified that Goole told him that Wagner was "harassing the guys and the primary purpose being to get them to leave the Company, to get them to join—to leave the Company and join a union contractor." (Tr. 101.) Dobbins' testimony, however, reflects only part of what Goole told him.

On direct examination, Goole testified that Wagner told him "all the pros about the Union," like earning more money and having a better pension. (Tr. 156.) Goole stated that Wagner told him that the union representative could get him a job. On cross-examination, Goole testified as follows:

> Q. Well, you know that—that if a Union doesn't have employees, they are just contractors who—
>
> A. I guess so. I don't know much about the Union.
>
> Q. Okay. And Mr. Wagner gave you some literature, didn't he, that detailed the union benefits that if—-
>
> A. Yes, he did.
>
> Q.—if you went to work for a contractor that had—
>
> A. It had all the wages and the pension plan and stuff like that.
>
> Q. Um-hmm. And he talked to you about those union benefits and you—when you talked to Mr. Dobbins, you relayed all that to Mr. Dobbins, didn't you?
>
> A. Oh, yes, I did.
>
> Q. And Wagner talked to you about the benefits of joining the Union, right?
>
> A. Um-hmm.
>
> Q. And he told you that you should think about going to the Union? Is that right?
>
> A. He said I should—he said I should join the Union.
>
> Q. Right. And you understood this to mean that you should leave West Michigan Plumbing & Heating to work—
>
> A. Yes.
>
> Q. —for the Union? Didn't you?
>
> A. Yes. [Tr. 157–158.]

Thus, the evidence shows that Goole told Dobbins that Wagner was talking to the employees about union benefits and that he was trying to get them to join the Union. The evidence also shows that Goole mistakenly believed that he would have to leave the Respondent in order to join or "work" for the Union.

In deciding to discharge Wagner, Dobbins sought to ignore the fact that Wagner's comments were made in the context of soliciting employees to join the Union. On direct examination, he testified that "the gist of the conversation was that, as I said, Greg (Goole) was feeling like he and the other employees were being harassed and coerced to leave our employment" to join a union contractor. (Tr. 101.) On cross-examination, he reluctantly conceded that Goole told him that Wagner had said that he would get better pay and benefits if he worked for a union contractor. (Tr.121.) Thus, the evidence supports a reasonable inference that Dobbins selectively ignored the information that Wagner's remarks where made in the context of organizing the employees.

The evidence also shows that Dobbins tailored his investigation to support the conclusion that Wagner was trying to persuade employees to leave the Respondent to work for a competitor. It shows that even before talking to Sisco and Boven, Dobbins prepared a statement for them to review and sign which stated, "This will confirm that I on or about _____, 1999, _____ tried to persuade me to resign my employment at West Michigan Plumbing & Heating." (Tr. 126.) He also asked them if Wagner had coerced or tried to persuade them or anyone else to leave employment with the Respondent without giving them the opportunity to explain everything that was said to them and vice versa. In other words, Dobbins was not trying to verify Wagner's side of the story, he only wanted to confirm what he set out to prove. At Dobbins' request, Sisco and Boven each gave a one or two line handwritten statement that they either observed Wagner talking to Goole about leaving his job with the Respondent and/or that they were "approached" by Wagner about leaving their jobs with the Respondent. (R. Exhs. 11–13.)[8] Thus, the evidence supports a reasonable inference that Dobbins heard what he wanted to hear and sought information to support what he wanted to conclude, that is, that Wagner was soliciting employees to work for a competitor.

Notwithstanding the impression that the Respondent seeks to foster, the undisputed evidence shows that Wagner was engaged in soliciting the Respondent's employees to join the Union and that his conduct falls within the broad protective gambit of Section 7 of the Act.[9] There is no evidence that Wagner engaged in other unrelated and indefensible conduct, which demonstrates that the same action would have taken place, even in the absence of protected conduct. I find that the Respondent cannot insulate its unlawful conduct by selectively filtering out or ignoring the evidence of union conduct. Indeed, when

[8] The evidence reveals that Sisco and Boven were two employees who complained to Goole about Wagner soliciting employees to join the Union. Thus, their input in the so-called investigation was not exactly unbiased.

[9] The Respondent does not argue that Wagner was not engaged in protected activity.

viewed as whole the same evidence upon which the Respondent bases its defense shows that Wagner's conduct is protected under the Act. Thus, I find that the Respondent has failed to prove that Wagner would have been discharged in the absence of the protected union activity. *Timekeeping Systems, Inc.,* 323 NLRB 244 (1997).

Accordingly, I find that the Respondent unlawfully discharged Wagner on May 26, 1999 in violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by promulgating, implementing, and maintaining a rule which encourages employees, who believe that they are being coerced or pressured to join a union or sign an authorization card, to report the matter to management.
4. The Respondent violated Section 8(a)(3) of the Act by reassigning, isolating, and discharging Mikkel Wagner.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. The Respondent did not otherwise engage in any other unfair labor practice alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully reassigned, isolated, and discharged Mikkel Wagner in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent reinstate him to his former job with a field crew or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges enjoyed; if necessary, terminating the services of employees hired in his stead, and to make him whole for wage and benefit losses that he may have suffered by virtue of the discrimination practiced against him for the period May 20, 1999, to the date the Respondent offers reinstatement, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, West Michigan Plumbing and Heating, Inc., Richland, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, implementing, and maintaining a rule which encourages employees, who believe that they are being coerced or pressured to join a union or sign an authorization card, to report the matter to management.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind its rule which encourages employees, who believe that they are being coerced or pressured to join a union or sign an authorization card, to report the matter to management.

(b) Within 14 days from the date of this Order, offer Mikkel Wagner full reinstatement to his former job with a field crew or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed.

(c) Make Mikkel Wagner whole for any loss of earnings and other benefits suffered as a result of discrimination against him in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful reassignment, isolation, and discharge of Mikkel Wagner and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Richland, Michigan copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.